

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

KATHLEEN KITTERMAN, ANNA CRONIN,
CORRIE BALL, MARVIN BALL, MARGARET
BROGAN and EVAN JONES,

Plaintiffs,

CASE NO. 2:12cv146

v.

CLAUDIO TOVAR-GUZMAN,
FORTINO GARCIA and SONS
HARVESTING, INC., and
KUZZENS, INC.,

Defendants.

DEPOSITION OF
FORTINO GARCIA

Taken on Behalf of the Plaintiffs

DATE TAKEN: February 21, 2013
TIME: 3:49 p.m. to 5:18 p.m.
PLACE: Gregory Court Reporting
2605 Airport Road South
Naples, Florida 34112

Examination of the witness taken before:

Terri L. Lewis, Notary and Court Reporter
Gregory Court Reporting Service, Inc.
2650 Airport Road South
Naples, FL 34112

1 APPEARANCES
2
3

4 For the Plaintiffs: PATRICK M. BROGAN, ESQ.
5 Davey & Brogan, PC
6 101 Granby St., Suite 300
7 Norfolk, VA 23514-3188
8

9 For Defendant Claudio JAMES R. JEBO, ESQ.
10 Tovar-Guzman and Harman, Claytor, Corrigan &
11 Fortino Garcia and Wellman
12 Sons Harvesting, Inc.: P.O. Box 70280
13 Richmond, VA 23255
14

15 For Defendant USAA: JOHN G. BAKER, ESQ.
16 Fraim & Fiorella, PC
17 Town Point Center
18 150 Boush Street, Suite 601
19 Norfolk, VA
20

21 For Defendant ACE: ALEXANDER K. PAGE, ESQ.
22 LeClair Ryan
23 123 East Main Street
24 Eighth Floor
25 Charlottesville, VA 22902
26

27 For Defendant Kuzzens, BRIAN N. CASEY, ESQ.
28 Inc.: Taylor & Walker, PC
29 555 East Main Street
30 Suite 1300
31 Norfolk, VA 23510
32
33

34 * * * * *

1	INDEX	
2	WITNESS	PAGE
3	FORTINO GARCIA	
4	Direct Examination by Mr. Brogan	4
5	Cross-Examination by Mr. Casey	58
6	Cross-Examination by Mr. Baker	59
7	Redirect Examination by Mr. Brogan	60
8		
9	* * * * *	
10	EXHIBITS	
11	DESCRIPTION	PAGE
12	1 Notice of Deposition	8
13	2 Independent Contract Agreement	22
14	3 Employee Checks	32
15	5 Photo	53
16	6 Photo	54
17	7 Photo	54
18	8 Photo	54
19	9 Photo	55
20		
21	* * * * *	
22		
23		
24		
25		

1 BY MR. BROGAN:

2 Q Lipman Produce, just one P --

3 A Yes.

4 Q -- is that right?

5 A Yes.

6 Q Are they a company?

7 A Yes.

8 Q Are they a subsidiary of 6L Farm?

9 A Correct.

10 Q Do you know the hierarchy of 6L and Lipman and
11 what Lipman is? Is it truly a corporation?

12 A It's a big company that we work for. I've
13 been working for them for 25, 30 years.

14 Q Okay. And when you say work for them, do you
15 actually get paid by them?

16 A Yes.

17 Q And how do you get paid?

18 A By a check.

19 Q Okay.

20 A They pay me a check every week.

21 Q Okay. And are you -- do you get paid a
22 salary?

23 A Yes -- not on a salary. It all depends what
24 we work. We don't get paid by salary. We -- as much as
25 we do, if -- when we -- we harvest tomatoes, so whatever

1 we harvest, that's what we get paid for.

2 Q Okay. So do you work for anybody other than
3 Lipman?

4 A No.

5 Q Okay. How long have you worked for Lipman?

6 A I've been working for them by myself since
7 1985.

8 Q Okay. And do you have a contract with Lipman?

9 A Not -- just the one that's written down like
10 this one when we go up the road.

11 Q Okay. So what you're saying is that when you
12 go on the road, you mean somewhere outside of Florida --

13 A Right, correct.

14 Q -- they require you to sign a contract?

15 A Uh-huh.

16 Q But when you remain in Florida you do not?

17 A They give us one when we go out and when we
18 come back from Florida. We get two contracts.

19 Q Okay. How often do you work for Lipman? Is
20 this --

21 A Year round.

22 Q -- this a year-round thing?

23 A Yeah.

24 Q Okay. How often do you go out of the State of
25 Florida for Lipman?

1 Q Okay. Now, do you, yourself, leave Florida
2 with them on June 1st --

3 A Yes.

4 Q -- to go to South Carolina?

5 A Well, they go first one day, and then I go
6 right behind them, yes.

7 Q Okay. And then -- so you're there for the
8 four weeks in South Carolina?

9 A Yes.

10 Q And when they go to Exmore, Virginia, you're
11 there with them?

12 A Yes.

13 Q For -- is it four weeks in Exmore?

14 A No. In Exmore, we're there from July 4th to
15 October 15th.

16 Q Wow. Is it that much bigger than Lipman's
17 place in Beaufort, South Carolina?

18 A Yes.

19 Q Okay. So is it always July 4th that you get
20 there?

21 A Yes.

22 Q Okay. You say your job is to drive them from
23 the housing to the farm. Do you, in fact, drive the
24 bus?

25 A One of them, yes.

1 Q You, personally?

2 A Yes.

3 Q How many buses do you have?

4 A Three.

5 Q And who are your -- how many drivers do you
6 have?

7 A Two and me.

8 Q Who are the other two drivers? Well -- excuse
9 me. Who were the other two drivers back in July of
10 2011?

11 A At the time we only had two buses.

12 Q Okay. So in 2011 you only had two buses.

13 A Yes.

14 Q And who were your drivers in 2011?

15 A It was Victor Roman and me.

16 Q And how long had Victor Roman worked for you?

17 A Ten years.

18 Q Does he still work for you?

19 A Yes.

20 Q And is Victor Roman an employee of the
21 company? Do you hire -- does the company hire Victor
22 Roman?

23 A I hire Victor Roman, but he's under Lipman's
24 company. Lipman pays him.

25 Q Lipman pays him a check every week, is that

1 "Department of Labor and Employment Security Farm Labor
2 Contractor Registration, Workers' Compensation
3 Information." Okay. That's what it says; that's the
4 title up at the top.

5 A Uh-huh.

6 Q You got that? And here it says -- it's
7 addressed to you, and it's signed by a David --

8 MR. JEBO: Garcia.

9 BY MR. BROGAN:

10 Q Is that David Garcia?

11 A Yes.

12 Q Oh, I got it. Okay. Very good. And this
13 thing, although it says effective date August 15, 2011,
14 you would have had one of these also when you left
15 Florida, correct?

16 A Yes.

17 Q Okay. And it says Kuzzens, Inc./South
18 Carolina, and then if you'd turn the page, it says
19 Kuzzens, Inc., Virginia, correct?

20 A Correct.

21 Q And that was also signed by David Garcia?

22 A Correct.

23 Q And they both say pretty much the same thing,
24 but the first sentence says, we "Will pay premium for
25 workers' compensation insurance on you and your crew

1 members as long as you are in our employment"; is that
2 correct?

3 A Correct.

4 Q Okay. So this is an agreement by Kuzzens,
5 Inc., to pay workers' comp insurance for you and all of
6 your crew members as long as you are being an employed
7 by Kuzzens, Inc.?

8 A Correct.

9 Q Okay. Now, you were -- on July -- on
10 June 30th, say, 2011, you and your crew were in Kuzzens,
11 Inc., South Carolina, the farm?

12 A Yes.

13 Q And then everybody was supposed to re-form in
14 Exmore, Virginia -- at Kuzzens, Inc., in Exmore,
15 Virginia, correct?

16 A Yes.

17 Q Okay. So you don't fire all your crew and
18 then re-hire them in Exmore, Virginia, do you?

19 A No.

20 Q Okay. So they're still in your employ from
21 the time they leave South Carolina or still in the
22 employ of Kuzzens and Lipman Produce when they leave
23 South Carolina as when they reach Exmore, Virginia,
24 correct?

25 A Correct, but the problem is that there's not

1 always the same people.

2 Q Okay.

3 A They go different ways, and we have to
4 re-register different people.

5 Q Okay.

6 A So --

7 Q But if they don't leave your employ --

8 A Yes.

9 Q -- they're still in your employ?

10 A Yes.

11 Q Okay. Was Claudio Tovar-Guzman still in your
12 employ when he got to Exmore, Virginia?

13 A Yes.

14 Q And he was in your employ and that of Kuzzens,
15 Inc., and Lipman Produce when he left Kuzzens, Inc., at
16 South Carolina?

17 A Yes.

18 Q Okay. And Kuzzens, Inc., paid the workers'
19 comp insurance for them during all of this time?

20 A Right.

21 Q Okay.

22 A But Claudio, at the scene of the accident, I
23 haven't seen him since.

24 Q Okay. I understand that. You saw Claudio
25 Tovar-Guzman at the scene of the accident?

1 A Farm 7 here in Naples.

2 Q Okay. So you have a routine down. You don't
3 have to be told when you're going to be going to any
4 particular farm. You have that as a schedule that
5 you've been doing for the last 10 years; is that
6 correct?

7 A That's correct, but David Garcia, he tells
8 us --

9 Q Okay.

10 A -- you're going to move to such and such
11 farms.

12 Q Okay. And does he tell you when you're
13 supposed to be there?

14 A Yes.

15 Q All right. Do you know what David Garcia's
16 address is?

17 A Not his home address, no, sir.

18 Q Okay. How would you get ahold of him if you
19 needed to?

20 A We call him on the phone.

21 Q Do you have his telephone number?

22 A 239-898-1806.

23 Q Thank you.

24 (Exhibit 3 was marked for identification.)

25 Let me show you what has previously been

1 of 2011, did your -- did the employees, the workers, get
2 paid every week?

3 A Yes.

4 Q Who gave them the checks?

5 A The company -- I mean Lipman.

6 Q Lipman. Lipman gave them -- and was it a
7 Lipman check?

8 A Yes.

9 Q Okay. Did Tovar-Guzman get a check every week
10 that -- when he was working in June of 2011 in South
11 Carolina at Lipman's farm?

12 A Yes.

13 Q And that was Kuzzens, Inc.'s farm; is that
14 correct?

15 A Yes.

16 Q Okay. When all the workers are trying to get
17 from South Carolina to Virginia, how do they get from
18 South Carolina to Virginia?

19 A Some of them ride the bus with Victor Roman,
20 and some of them have their own vehicles.

21 Q Okay. So -- but you do provide transportation
22 to the migrant workers from Kuzzens' farm in South
23 Carolina to Kuzzens' farm in Exmore?

24 A Yes.

25 Q Okay. I understand that you hired -- or at

1 least in your answers to interrogatories you say you
2 hired an individual name Victor Sanchez. Who is Victor
3 Sanchez?

4 A He was just there. I told him I needed a
5 driver for my bus because I had to stay behind, and he
6 said that he would take the bus for me. I paid him
7 \$200. And then he said the other guy said he's going to
8 go with him, you know, to show him where the farm was,
9 the camp with the people's things.

10 Q And by the other guy, you mean Tovar-Guzman?

11 A Tovar, guess.

12 Q Okay. So where is -- how do you know Victor
13 Sanchez?

14 A I never known him. He just knew that I was
15 looking for a driver, and he come to me.

16 Q Okay. Did he fill out one of those
17 pre-employment --

18 A No.

19 Q -- questionnaires?

20 A No.

21 Q Okay. Where does Victor Sanchez work? I
22 mean, where does he live now?

23 A At the time he was in South Carolina.

24 Q Did you have an address for him?

25 A No.

1 Q Do you have a photocopy of a driver's license
2 he had?

3 A No. I just checked his license to make sure
4 it was good --

5 Q Okay.

6 A -- and he had a license to drive the bus.

7 Q What license did he have?

8 A Class A, CDL, passenger endorsement.

9 Q For what state?

10 A South Carolina.

11 Q When was this that you talked to him?

12 A I don't remember.

13 Q Do you know when they left South Carolina?

14 A I think it was on the 29th, the 28th of --
15 because we were supposed to be, on the 1st, in Virginia.

16 Q You were supposed to be in Virginia on the 1st
17 of July in 2011?

18 A Yes.

19 Q And why were you supposed to be there
20 July 1st?

21 A To start harvest, second crop.

22 Q Who told you to be there July 1st?

23 A Garcia, but I don't remember if it was the
24 first or the -- to be -- I don't know what actual day,
25 but it was around them days.

1 Q Okay. You know this accident happened
2 July 2nd at about 7 o'clock in the morning.

3 A (Witness nods head.)

4 Q Do you know when this guy Victor Sanchez and
5 Tovar-Guzman left South Carolina?

6 A It was on the 1st around 8 o'clock at night.

7 Q Have you ever seen Victor Sanchez since?

8 A I -- no.

9 Q Have you spoken to him since?

10 A No.

11 Q Do you have any paperwork on this guy Victor
12 Sanchez?

13 A No.

14 Q Did you pay him \$200 in cash or check?

15 A Cash.

16 Q You don't have any information as to what --
17 where he lived?

18 A (Witness shakes head.)

19 Q You didn't photocopy his CDL?

20 A No.

21 Q Did he have insurance? Did he personally have
22 insurance, an automobile insurance?

23 A I don't know.

24 Q Okay. Do you know what happened to Victor
25 Sanchez?

1 A No.

2 Q Did he ever make it to Exmore, Virginia?

3 A No.

4 Q Did he make it --

5 A What happened, down the middle of the road,

6 Guzman told me that he stepped off the bus, he never

7 came back, and that's when he drove the bus.

8 Q Did he say where he was when this guy Sanchez

9 stepped off the bus?

10 A He just told me somewhere in South Carolina --

11 South Carolina.

12 Q Was it North or South Carolina?

13 A North Carolina.

14 Q I mean, did he say what city in North

15 Carolina?

16 A No.

17 Q Did he say why they were stopping in North

18 Carolina?

19 A No. He just told me they stopped at the

20 store.

21 Q Did he tell you what they were buying?

22 A No.

23 Q Did they buy alcohol?

24 A No.

25 Q So Victor Sanchez, did he ever work for you --

1 A No.

2 Q -- other than the fact that you paid him \$200
3 to drive your bus?

4 A Yes.

5 Q Okay. How did you find him?

6 A He was always around at the store where we
7 usually get our fuel. He found out I needed a driver.
8 He came up to me, and he told me that he would help me
9 out, and I said fine.

10 Q So did you hire him July 1st at 8 o'clock
11 before the -- how much before they left did you hire
12 him? How --

13 A I didn't -- well, I didn't hire him. I just
14 paid him to take the bus.

15 Q Okay. Paid him to take the bus. When did you
16 pay him to take the bus; when they were leaving?

17 A When they left.

18 Q Okay. So the bus was all packed with gear; is
19 that right?

20 A Stuff, people -- people's stuff, yes.

21 Q Okay. And it was packed with the stuff of all
22 the various migrant and seasonal workers?

23 A (Witness nods head.)

24 Q And you had arranged this, like, the day
25 before, or did you just go and fill up with gas and find

1 8 o'clock that evening --

2 A Yes.

3 Q -- and drive through the night?

4 A Yes.

5 Q Did you discuss with -- you know, in your
6 answers to interrogatories you say that Tovar-Guzman was
7 forbidden to drive the bus. How do you -- what words
8 did you use to tell Tovar-Guzman not to drive the bus?

9 A Tovar works for me in the farm, in the fields.
10 He drives the trucks for me in the fields, and he knows
11 that he wasn't -- he never drives on the highway. So he
12 knew that he wasn't supposed to drive that bus.

13 Q Okay. So you didn't -- you didn't specify,
14 you know, July 1st at 8 o'clock, as they're leaving, and
15 Tovar, you know you're not supposed to drive this bus,
16 right?

17 A No, I didn't.

18 Q Okay. But he does drive the bus when it's in
19 the fields?

20 A Not the bus, the field trucks.

21 Q The field trucks.

22 A Right.

23 Q What's a field truck?

24 A Tomato trucks that we use in the farm like
25 with a flatbed that we put tomatoes on them.

1 MR. BROGAN: Guys, can we take a three-minute
2 break?

3 (A brief recess was had.)

4 BY MR. BROGAN:

5 Q So you don't know where in North Carolina
6 Victor Sanchez quit?

7 A No.

8 Q Do you only hire drivers with the first name
9 Victor?

10 MR. JEBO: Objection.

11 BY MR. BROGAN:

12 Q All right. So let me get your understanding
13 of what Mr. Guzman knew. When he left, Mr. Guzman knew
14 that he had to get the equipment to Exmore, Virginia,
15 the next day, correct?

16 A Yes.

17 Q And it was important to get it there the next
18 day, correct --

19 A Yes.

20 Q -- because these guys were going -- these
21 guys -- the seasonal and migrant workers were going to
22 be working in the fields, and they needed their personal
23 equipment and gear so that they could go work in the
24 fields?

25 A Yes.

1 Q He knew Lipman needed to have those workers in
2 their fields, and that's why the equipment was important
3 to get to Exmore?

4 A Yes.

5 Q Okay. And he's driven trucks and other things
6 for you in the past?

7 A Yes.

8 Q With respect to these various employees, these
9 seasonal workers, can Lipman fire anyone that they find
10 not to be working out satisfactorily?

11 A Could you explain to me again?

12 Q Sure. Say they find somebody who's -- walks
13 into the field, sits down, lights up a cigarette, spends
14 the day sitting, smoking their cigarette, can David
15 Garcia fire them?

16 A No.

17 Q Why not?

18 A They're not doing anything wrong. I mean,
19 they have their own time to do it. So if they want to
20 do something like that, they just walk out of the field
21 and do it, and then they walk back into the field.

22 Q Okay. Who has the power to fire an employee,
23 a worker?

24 A Well, it all depends on what they do.

25 Q Right.

1 Q And why did he choose to go into the bus with
2 Victor Sanchez? Why did he choose to go?

3 A He said he would go there because all his
4 stuff was in there, and he didn't want to misplace it.

5 Q I mean, did you ask him to go with --

6 A No.

7 Q You were going to just turn the bus without
8 any other person in the bus over to this Victor Sanchez?

9 A Yes.

10 Q All right. How are you reimbursed for the
11 buses? I take it Fortino Garcia and Sons Harvesting,
12 they own those two buses -- in July of 2011, they owned
13 two buses, correct?

14 A Yes.

15 Q And do you lease them to Kuzzens or Lipman, or
16 how does Lipman pay you for the use of those buses?

17 A They pay us daily, so much a bus.

18 Q Do you have an agreement with them as to the
19 buses?

20 A No.

21 Q So they pay you a daily rate?

22 A A daily rate of 170.

23 Q \$170 per bus --

24 A Yes.

25 Q -- per day? And that \$170 per bus per day

1 CERTIFICATE OF REPORTER

2 STATE OF FLORIDA

3 COUNTY OF COLLIER

4 I, Terri L. Lewis, do hereby certify that I
5 was authorized to and did stenographically report the
6 deposition of FORTINO GARCIA; that a review of the
7 transcript was not requested; and that the foregoing
8 transcript is a true record of my stenographic notes.

9 I FURTHER CERTIFY that I am not a relative,
10 employee or attorney, or counsel of any of the parties,
11 nor am I a relative or employee of any of the parties'
12 attorney or counsel connected with the action, nor am I
13 financially interested in the action.

14 DATED this 5th day of March 2013 at Naples,
15 Collier County, Florida.

16
17
18 Terri L. Lewis
19 Terri L. Lewis, Court Reporter
20 and Notary Public
21
22
23
24
25